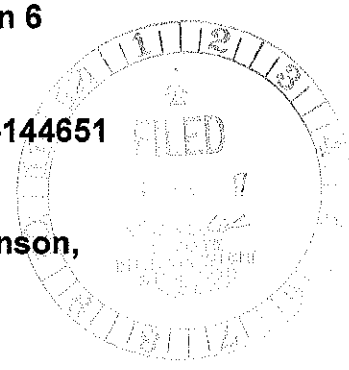
IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 49A02-0701-CR-000110

MICHAEL HILL, Appellant (Defendant below)	)	Appeal from the Marion Superior Court, Criminal Division 6
v.	)	Cause No. 49G06-0508-FA-144651
STATE OF INDIANA, Appellee	)	The Honorable Jane Magnus-Stinson, Judge



BRIEF OF APPELLANT

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Attorney for Appellant

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Appellant (Defendant below)	)	**Marion Superior Court,**
	)	**Criminal Division 6**
	)	
v.	)	**Cause No.**
	)	**49G06-0508-FA-144651**
	)	
STATE OF INDIANA,	)	**The Honorable**
Appellee	)	**Jane Magnus-Stinson,**
	)	**Judge**

BRIEF OF APPELLANT

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Whether the trial court erred when it permitted the State to belatedly amend the charging information as to a matter of substance in violation of Indiana Code § 35-34-1-5(b).

II. Whether the evidence was insufficient to prove that Michael Hill was guilty of attempt sexual misconduct with a minor when he asserted the affirmative defense of reasonable belief as to the victim's age.

STATEMENT OF THE CASE

1. Prior Proceedings

On August 23, 2005 the State of Indiana charged Michael Hill, by information, with Attempt Child Molest[1] as a class A felony and Resisting Law Enforcement[2]

[1] IC 35-42-4-3
[2] IC 35-44-3-3

as class A misdemeanor. At Mr. Hill's initial hearing on August 24, 2005, the trial court set the Omnibus Date for October 21, 2005 [App. 184]. On October 25, 2005, the State filed a Motion to Add Count III, Attempt Sexual Misconduct with a Minor[3] as a class B felony [App. 52]. In its Motion, the State represented that an omnibus date had not been set, in spite of the Court's written order at Mr. Hill's initial hearing. Per Judge Jeffrey Marchal's note on the State's Motion, Mr. Hill's counsel objected to the State's Motion [App. 52]. The court granted the motion that same day thus adding one count of Attempt Sexual Misconduct with a Minor as a class B felony [App. 52].

Mr. Hill was tried to a jury on July 10 and 11, 2006 [App. 16-8, T. 21-257]. The jury convicted Mr. Hill of two counts, counts 2 and 3: Resisting Law Enforcement as a Class A misdemeanor and Attempt Sexual Misconduct with a Minor as a class B felony, and acquitted him of Attempt Child Molest as a class A felony [App. 180-2, T. 254-6].

2. Sentencing[4]

On July 26, 2006 the trial court sentenced Mr. Hill as follows:

> Thank you. Well, I sympathize with the defendant's mother and his aunt, who clearly love him very much and who respect his ability with his children. But I am struggling with the claim of hardship to dependents for somebody who around the time of this crime, and I'm not sure that the fact that the conviction for the dealing occurred, that the conviction was after the date of this offense, the fact of the matter is he, he was released on that case at the time of this offense, and he ultimately pled guilty to dealing, which means while he was supposedly being this good father he's dealing cocaine and, as the jury found

[3] IC 35-42-4-9

[4] Appellate Rule 46(A)(10) requires the appealed sentencing order included in the brief. However, as a general practice Marion County Superior Courts do no produce such orders leaving the statement in the transcript, reproduced herein, as the best record of the sentencing order. An Abstract of Judgment, reflecting the conclusions of sentence, may be found on page 28 of the Appendix and attached to this brief.

in this case, attempting to find contact with underage girls. I'm not saying he was looking for tiny children, but I think the jury's inference was commonsensical. I think the defendant's explanations for his behavior were not credible nor credited, and I think having observed the victim in this case who, while she is built physically, she's a tall girl, she's a large girls, perhaps looks taller than a thirteen year old, or bigger than a thirteen year old, her demeanor did certainly not betray maybe maturity (indiscernible) her age, let alone beyond. And I, I think of the defendant's mother and aunt's concerns for his children, and I think of the victim's parents finding a naked man under their daughter's bed while they sat in a room next door watching television. And it's a fairly horrifying experience I would think. So I don't think you can claim to be a great dad on the one hand and, and deal cocaine and try to have, pursue a relationship with minor children on the phone. I'm not discounting that he had custody of his daughter, I'm not discounting that the loves his children. I don't think he's a pedophile. I think he was a man looking for young sex is what I think, and that came through from the evidence in the case, and it's illegal. And it is a form of pedophilia, I suppose, or some sort of different taste. Anyway, the Court finds that the aggravators of the dealing in cocaine conduct, the conviction I think the Court can count today as well, and his, not the worst, but his fairly constant involvement in the criminal justice system indicates to the Court that the defendant has trouble conforming society's rules. All that being said, the Court will find that the presumptive sentence in this case of ten years is appropriate. The Court does not believe community placement will be appropriate. I don't think it's legal, and I don't think clarifies or serves to emphasize the severity of the, of the facts in the case. So the Court will order it to be served in entirety at the Department of Corrections. He gets three hundred and thirty-seven days credit. [T. 278-280]

3. Notice of Appeal

A timely Notice of Appeal was filed on August 25, 2006 [App. 1]; however, the Clerk lost the original and the Trial Court ordered Appellant's counsel to file a Second Notice of Appeal, which was filed and granted on November 2, 2006 [App. 2].

4. Record of Proceedings

The Clerk's Notice of Completion of Transcript was filed on June 18, 2007, thus completing the record.

STATEMENT OF THE FACTS

Thirteen-year-old P.C. called an adult chat line and represented herself to be seventeen years old [T. 48]. P.C. began talking with an individual by the name of James, but P.C. never informed James of her real age [T.49-50]. On August 11, 2005, P.C. was in her bedroom and spoke with James and invited him over [T. 52-3]. P.C. never disclosed her true age to Mr. Hill [T. 62]. James removed both P.C.'s and his own pants and put on a condom; however, before any sexual acts occurred, P.C.'s step-father knocked on the door and found James and detained him by placing a choke hold on him, rendering him unconscious [T. 55-9, 104]. At trial, P.C. identified James as Michael Hill [T. 61].

P.C.'s mother testified that she had spoken with the individual known as James at least four times and told James that P.C. was fourteen years old [T. 91-92] and that she had spoken with James for over a month [T. 95]. Mr. Hill testified with his phone records that he had placed and received a total of eighteen calls to P.C., but that all calls occurred on August 10-11, 2005 [T.160-6]. Additional facts will be added as necessary.

SUMMARY OF THE ARGUMENTS

Indiana Code § 35-34-1-5(b) is clear and permits an amendment to the charging information relating to matters of substance only if it is filed at least thirty days before the omnibus date when the defendant is charged with a felony. The trial court erred when it allowed the State to add Count 3, Attempt Sexual Misconduct with a Minor, an amendment of substance, after the deadline for such amendments had passed.

Evidence is insufficient to support the conviction of attempt sexual misconduct with a minor. Mr. Hill's affirmative defense of reasonable belief was proven by a preponderance of the evidence and, therefore, the State's evidence did not rise to the level of proof beyond a reasonable doubt.

ARGUMENT

I. The trial court erred when it permitted the State to belatedly amend the charging information as to a matter of substance in violation of Indiana Code § 35-34-1-5(b).

Legal Standard

A pure question of law should be reviewed de novo. *State v. Moss-Dwyer*, 686 N.E.2d 109, 110 (Ind. 1997). At the time relevant to this case, Indiana Code § 35-34-1-5(b) was clear and permitted an amendment to the charging information relating to matters of substance only if it was filed the specified thirty days before the omnibus date. *Fajardo v. State*, 859 N.E.2d 1201, 1207 (Ind. 2007).

Argument

Although the deadline of thirty days before the omnibus date had lapsed, the court allowed the State to amend the charges against Mr. Hill by adding Count 3, Attempt Sexual Misconduct with a Minor [App. 9, 52]. The State filed its motion on October 25, 2005, four days after the omnibus date of October 21, 2005, and the court granted its motion on October 25, 2005 over Mr. Hill's objection [App. 52]. Further, the trial court's ruling to allow the late amendment was in clear contravention of IC § 35-34-1-5(b) and even if not preserved would constitute fundamental error. The doctrine of fundamental error applies when, as here, the error constitutes a blatant violation of basic principles, the harm, or potential for harm, is substantial, and the resulting error denies the defendant fundamental

due process. *Matthews v. State,* 849 N.E.2d 578, 587 (Ind. 2006), internal citations omitted. The belated filing of the Attempt Sexual Misconduct with a Minor was an amendment relating to matters of substance, not permitted by IC § 35-34-1-5(b), the trial court erred when it allowed it.

Ind. Code § 35-34-1-5 governs the amendment of a charging information and allows amendments at various stages of the proceedings depending on whether the amendment is to the form or to the substance of the original information[5]. Subsection (a) permits an

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[5] 35-34-1-5. Amendment of charge.

(a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:

(1) Any miswriting, misspelling, or grammatical error;

(2) Any misjoinder of parties defendant or offenses charged;

(3) The presence of any unnecessary repugnant allegation;

(4) The failure to negate any exception, excuse, or provision contained in the statute defining the offense;

(5) The use of alternative or disjunctive allegations as to the acts, means, intents, or results charged;

(6) Any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;

(7) The failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;

(8) The failure to state an amount of value or price of any matter where that value or price is not of the essence of the offense; or

(9) Any other defect which does not prejudice the substantial rights of the defendant.

(b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

(1) Thirty (30) days if the defendant is charged with a felony; or

(2) Fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date. When the information or indictment is amended, it shall be signed by

amendment "because of any immaterial defect" at any time and lists nine examples, including, "(9) any other defect which does not prejudice the substantial rights of the defendant." Subsection (c) also permits an amendment at any time "in respect to any defect, imperfection, or omission *in form* which does not prejudice the substantial right of the defendant. *Ind. Code § 35-34-1-5* (emphasis added).

Subsection (b), however, clearly limits the timeframe in which specific types of amendments may be made. It states:

> (b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:
> (1) thirty (30) days if the defendant is charged with a felony; or
> (2) fifteen (15) days if the defendant is charged only with one or more misdemeanors;
> before the omnibus date. *Ind. Code § 35-34-1-5(b).*

Subsection (b) establishes thirty (30) days before the omnibus date as the deadline for any amendment to matters of substance in cases where the defendant is charged with a felony. The omnibus date in this felony case was October 21, 2005, making the deadline for amendments to the substance of the charging information thirty days prior or September 21, 2005 [App. 184]. The State did not file its motion and amended information until

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the prosecuting attorney.

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

(d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

(e) An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

October 25 and October 27, 2005, respectively, when an amendment as to substance would not be permissible [App. 52, 56].

The first step in evaluating whether the amendment was permissible is to determine whether it is addressed to a matter of substance or one of form or material defect. *Fajardo v. State,* 859 N.E.2d 1201, 1207 (Ind. 2007). An amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, *and* (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime. *McIntyre v. State,* 717 N.E.2d 114, 125-6 (Ind. 1999) (emphasis supplied). Applying this standard, the amendment of the charging information to add a new allegation of Attempt Sexual Misconduct with a Minor is one of substance.

This amendment fails to meet the requirement that the accused's evidence would apply equally to the information in either form. Specifically, the amended information required Mr. Hill to provide evidence of the alleged victim's age which was wholly different from that of the original charge. The original charging information required the State to prove that the child was under the age of fourteen (14); however, the new charge added the requirement of knowledge to Mr. Hill in that he believed the child was between fourteen (14) and sixteen (16) years of age. This additional allegation requires the accused to present entirely different evidence than that required to defend against the original charge of attempt child molest alleged to have occurred in 2005. Further, it changed Mr. Hill's defense as to his reasonable belief concerning the age of the alleged victim. The accused's evidence is unequal in applicability to the amended information.

The Enhancement should be reversed and vacated.

II. The evidence is insufficient to support the conviction of attempt sexual misconduct with a minor.

Legal Standard

When reviewing a sufficiency claim, the Court looks only to the probative evidence and the inferences reasonably drawn therefrom favoring the verdict to see whether there was evidence to support a finding of guilt beyond a reasonable doubt. *Fry v. State*, 748 N.E.2d 369 (Ind. 2001). In prosecutions under the child molesting statute, the defendant must prove the reasonable belief defense by a preponderance of the evidence. *Moon v. State*, 823 N.E.2d 710 (Ind.Ct.App. 2005).

Argument

Indiana Code Section 35-42-4-9(c) states "It is a defense that the accused person reasonably believed the child was at least sixteen years old at the time of the conduct." Indiana Courts have ruled that since this defense addresses the defendant's culpability, the defendant bears the burden of proof by a preponderance of the evidence. *Moon* at 715.

The evidence in this case shows that Mr. Hill's belief that P.C. was at least sixteen years of age was reasonable and that the defense was proven by a preponderance of the evidence. Mr. Hill met P.C. by calling an adult chat line which explicitly stated, according to the testimony of both Mr. Hill and P.C., if the person was under the age of eighteen to hang up [T. 48, 140-1]. Both Mr. Hill and P.C. further testified that individuals had to state their age and once that

information was recorded, it was reviewed by the chat line and either approved or disapproved for use [T. 64-5, 142].

Mr. Hill testified that he gave P.C. his cellular phone number and that they contacted each other eighteen times on August 10 and 11, 2005 [T. 160-6, Exh. B]. No other record of phone calls existed between Mr. Hill and P.C. prior to August 10, 2005. P.C. stated that she indicated she was seventeen [T. 48] and that she never talked to Mr. Hill about her age [T. 49-50] nor did she ever disclose her actual age [T. 62]. P.C. also told Mr. Hill he could come over [T. 52-3] and gave him the security code to enter her apartment complex [T. 150]. Mr. Hill testified he did not how old P.C. really was and that he believed her to be eighteen years of age [T. 157-8].

The only evidence that the State offered as to P.C.'s actual age was her mother, who testified that she had informed an individual named "James" that her daughter was fourteen on at least four occasions [T. 91-2] and this occurred over the course of more than a month [T. 95]. P.C.'s mother stated she never actually heard Mr. Hill speak on the date of the incident [T. 98].

Under the incredible dubiosity rule, a court will impinge upon the fact finder's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *Murray v. State*, 761 N.E.2d 406 (Ind. 2002); *Sisson v. State*, 710 N.E.2d 203 (Ind.Ct.App. 1999). Here, the State offered nothing more than a statement from P.C.'s mother that she informed "James" at least four times that P.C. was fourteen, when in fact she was

thirteen. Further, Mr. Hill's phone records show the phone calls placed between P.C.'s home and his cellular phone and they only occurred for two days [Exh. A, B]. P.C.'s mother never stated that the voice on the phone belonging to "James" matched the voice of Mr. Hill since she admittedly never heard Mr. Hill speak [T. 98].

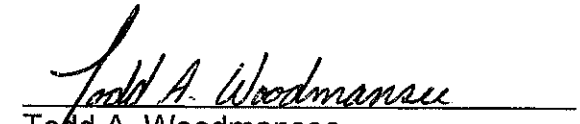
Finally, at the sentencing hearing in this cause, the Court even observed that the victim was "built physically, she's a tall girl, she's a large girls, perhaps looks taller than a thirteen year old, or bigger than a thirteen year old . . . ." [T. 279].

The evidence as a whole in this case leads to the conclusion that Mr. Hill reasonably believed that P.C. was at least sixteen years of age and the defense proved this by a preponderance of the evidence. The State did not present evidence beyond a reasonable doubt that Mr. Hill is guilty of attempt sexual misconduct as a minor and his conviction thereon must be vacated.

CONCLUSION

For the foregoing reasons, Mr. Hill respectfully requests this Court reverse and vacate his conviction and sentence for Attempt Sexual Misconduct with a Minor.

Respectfully submitted,



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Attorney No. 21161-49

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing have been served by personal service to the Attorney General of Indiana, 219 State House, Indianapolis, IN 46204, on this 24th Day of July, 2007.

Todd A. Woodmansee

Todd A. Woodmansee, Atty. No. 21161-49
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(317) 634-5544

ABSTRACT OF JUDGMENT
STATE FORM 8466
INDIANA DEPARTMENT OF CORRECTION

THE STATE OF INDIANA VS. MICHAEL L. HILL

INSTRUCTIONS: this form must accompany the Judgment, Pre-Sentence Report, and all other documents required by law, upon the commitment of the adult offender to the Indiana Department of Correction. A separate Abstract must be used for each Cause Number

CAUSE NO 49-G06-0508-FA-144651
DATE OF SENTENCING 07/26/06
PROSECUTOR MICHELLE WALL

COURT SUPERIOR CRIMINAL 06
MODIFICATION DATE 08/29/06
PRESIDING JUDGE JANE MAGNUS-STINSON
DEFENSE ATTORNEY LAURA PITTS

PART 1 The defendant was found Guilty of the following crimes under the above-referenced cause:

COUNT	CRIME	CLASS	FEL	MISD	STATUTORY CITATION
002	RESISTING LAW ENFORCEMENT/MA	MA		X	0035-0044-0003-0003
003	SEXUAL MISCONDUCT WITH A MINOR/FB	FB	X		0035-0042-0004-0009

PART 2 As a result of the above convictions, the Court has sentenced the defendant to the DOC as follows:
(If consecutive time is received, check only those counts which are to follow the original sentence)

COUNT	SENTENCE YEARS/DAYS	EXECUTED YEARS/DAYS	SUSPENDED YEARS/DAYS	CON. CUR.	CON. SEC.	...WITH (COUNT OR CAUSE#)
002	00001 Y	00365 D	00000 Y	X		
003	00010 Y	03650 D	00000 Y	X		

PART 3 JUDGE'S RECOMMENDATIONS

Is the defendant to be returned to the Court for probation at the completion of sentence? ___ Yes X No Chief Probation Officer

No. of days confined prior to sentencing 337 Recommended degree of security ___ MAX ___ MED ___ MIN X No Rec

Additional comments and recommendations:
Sentencing comments: SENTECCE MODIFIED TO SHOW CORRECT
Sentencing comments: SENTENCE. COURT RECOMMENDS SEX
Sentencing comments: OFFENDER TREATMENT. SENTENCING DATE TO
Sentencing comments: REMAIN 7-26-06

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PART 4 JUDICIAL SIGNATURE

Signature of committing Judge Jane Magnus-Stinson Date Signed 8-29-06

PART 5 AFFIDAVIT OF CLERK

State of Indiana)
County of Marion) SS:

I, DORIS A. SADLER, Clerk of Marion County, State of Indiana, do hereby certify that the foregoing is a true and complete abstract of judgment of said Court in the above-entitled cause, on the date first shown on record in my office. As testimony of these facts, I sign my name and affix the seal of the Superior Criminal Court 06 of Marion County, at my office in the City of Indianapolis

THIS 29 DAY OF August, 2006. Signature of Clerk Doris Ann Sadler